IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 21

ARO MANUFACTURING CO., INC., ET AL., *Petitioners*,

v.

CONVERTIBLE TOP REPLACEMENT CO., INC., *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1959

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v.

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

This case actually comprises a quite ordinary case of patent infringement, turning on questions of fact. It has now been before the courts of the First Circuit for almost four years; and throughout this time there has never been any question as to legal principles which control. The issues have at all times been factual; and the real issues presented by the Petition are still only issues of fact. Alleged issues of law, and constitutionality, are never reached under the facts of this case.

The record, upon which the courts found clear infringement, includes some eight depositions, approximately 110 interrogatories, 118 requests for admission,

and a number of fact stipulations. Trial required two weeks, during which time fact and expert witnesses testified at length for both sides, and physical demonstrations of the infringing structures were had. Models and other physical exhibits not now before this court were presented; and the entire proceedings were directed, solely, to a thorough development of the facts.

The decisions below were entirely factual in nature. The District Court opinion (119 USPQ 122) did not, for example, find it necessary to cite a single case. The Court of Appeals opinion is of essentially similar nature. While the Court of Appeals did cite prior cases, it nowhere disagreed with legal pronouncements, but merely determined the applicability of such cases to the particular facts developed by the extensive record.

The decisions below in no way conflict with rulings in other circuits or with applicable decisions of this Court, and are clearly correct in light of the particular facts here involved. It is accordingly submitted that further review by this Court is not warranted.

THE PETITION IGNORES PERTINENT FACTS

In its statement of the case, Petitioners have failed to mention a number of significant facts regarding the infringing structure, and Petitioners' acts of infringement. In view of the voluminous record below, only some of these facts will now be presented herein.

THE RECORD ESTABLISHES THAT THE MACKIE-DULUK FABRIC SHAPE IS NOVEL, UNIQUE, AND THE THING WHICH SOLVED LONG-STANDING PROBLEMS

The Mackie-Duluk invention solved problems of long-standing nature in the convertible top industry (JA 371, 372); and, as noted by the District Court (JA 34), the patented solution "was a substantial and enlightened step, filling a long felt want * * *."

In solving these problems, Mackie-Duluk did not make changes in the automobile body, the top linkage, or parts of the automobile which had existed prior to their invention (JA 143-4); and the actual improvement taught by Mackie-Duluk, and their invention, resided in a specially designed top fabric of unique shape* adapted to be installed on an otherwise conventional car in a completely new manner. Every witness, testifying for both sides below, agreed that the novel fabric shape taught by Mackie-Duluk and the unique mode of installation afforded thereby, was of major and primary importance in achieving the improvements accomplished by Mackie-Duluk. Petitioner Harold Shapiro, for example, testified (JA 85):

"Q. Does the idea of having a section of the fabric coming down inside the car and actually

* The so-called "wiping arm" used by Mackie-Duluk (Petition p. 4) acts as a conventional bow for holding the specially shaped fabric in place (JA 276). It is new, since prior fabrics did not have an elongated downwardly extending flap, whereby no bow was needed in this region; but once the new flap was provided, it became desirable to provide a new bow in this region for cooperation with the new flap. The invention, however, is in the new fabric shape, for without this shape there would be no purpose whatsoever in the wiper arm (JA 329). Petitioner Harold Shapiro himself testified that the wiping arm was actually "immaterial" (JA 84).

fastening on part of the car, for instance, adjacent to the trough, is that *the important thing?*
A. That is correct." (Emphasis added.)

Petitioner George Shapiro testified to similar effect (JA 49), as did Petitioners' witness Brosens (JA 323); and Respondents' witnesses Pickard (JA 398, 398-9), and Booth (JA 153).

It is also established by the record below that the uniquely shaped fabric taught by Mackie-Duluk was quite new. Petitioner Harold Shapiro expressly admitted (JA 85-6) that, to his knowledge, Mackie-Duluk's structure had never been employed prior to actual commercialization of the invention. Indeed, although Petitioners submitted some fifty prior patents and publications during trial (JA 267), none showed the uniquely shaped Mackie-Duluk fabric or the new mode of installation afforded thereby; and the District Court so found (JA 35).

DEFENDANTS' OWN ADMISSIONS SHOW INFRINGEMENT UNDER 35 U.S.C. § 271(c), AS WELL AS UNDER 35 U.S.C. § 271(b) AND (a)

Question 1 of the Petition (pp. 2-3) acknowledges that the Mackie-Duluk fabric, as sold by Petitioners, is an "essential element * * * of [the] patented combination"; and that Petitioners' Mackie-Duluk type fabrics are "especially cut and intended for use in the patented combination." The record goes much further, however, and shows that Petitioners fully admitted violating every provision of 35 U.S.C. § 271, no matter how strictly construed.

Thus, it was admitted (e.g. Pl. Req. Adm. 15 and Answer) that Petitioners sell a component of a patented machine, i.e. the specially shaped Mackie-Duluk

fabric. Petitioner further admitted (e.g. JA 84) that the special fabric constituted a material part of the invention; that (e.g. JA 50-1, and Pl. Req. Adm. 17 and Answer) these fabrics were specifically designed and sold by Petitioners for use in an infringing installation, i.e. they were sold knowing the same to be especially made or especially adapted for use in an infringement of the patent; and that these specially cut tops could be used only in the patented combination, had absolutely no other use, and could not be installed on cars not having the invention thereon (JA 50, 52, 120) i.e. the specially shaped fabrics are "not a staple article or commodity of commerce suitable for substantial non-infringing use."

The District Court found facts of similar import, e.g. Petitioners' specially cut fabrics were "admittedly purposely designed for, and advertised for, Mackie-Duluk tops" (JA 38); and "defendants' top would be useless" except in the patented arrangement (JA 41). The Court of appeals also found the record to be so clear that, in describing Petitioners' special top, the exact language of the statute could be directly employed; see 270 F. 2d 200, 205.

It is believed significant that the Petition nowhere challenges any of the foregoing findings of fact; and indeed, Petitioners could hardly quarrel with such findings since they are fully supported by Petitioners' own testimony.

While the Petition concentrates on 35 U.S.C. § 271 (c), the record also shows clear violation of other sections of the statute.* Thus, Petitioners' admissions below fully establish a consistent and active course of

*See 35 U.S.C. § 271(a) and (b), Petition Appendix A.

inducing infringement of the patent. Petitioners, over the years, persistently sought to have persons purchase and install the specially cut Mackie-Duluk fabrics, to infringe the patent; they distributed advertising literature; they gave demonstrations; indeed, they maintained a facility for actually installing the fabrics on cars, and, over the years, themselves installed the specially cut fabrics to produce infringing arrangements (JA 107, 109, 463-71).

The nature of the special Mackie-Duluk fabrics, and Petitioners' own installation activities, established moreover that Petitioners were actually reconstructing the patented invention; and the Court of Appeals so found (270 U.S. 200, 205), as did the District Court (JA 39). By so reconstructing the patented invention, and by their own installation procedures, Petitioners thus further violated 35 U.S.C. § 271(a). The Petition, p. 6, admits this to be so, by stating that the District Court found not only contributory infringement but also "found the Mackie-Duluk patent infringed by replacing the top fabrics."

In these circumstances, legal questions regarding 35 U.S.C. § 271(c), presented by the Petition, are never reached; for Petitioners would, on the facts of record, still be liable for infringement under other sections of the statute not even mentioned in Petitioners' Questions or fairly comprised therein.

ALTHOUGH PETITIONERS COULD HAVE MADE A NON-INFRINGING STRUCTURE, THEY INTENTIONALLY COPIED THE PATENTED INVENTION

But for the Mackie-Duluk special fabric shape, the remaining portions of the Mackie-Duluk arrangement are of such conventional nature that a fabric top of

entirely different shape can be installed on the car. During trial, Petitioners themselves demonstrated installation of another fabric shape, and testified that a non-infringing installation using such a different fabric shape would be simpler, more rapid, and cheaper than one using the special Mackie-Duluk type fabric (JA 213).

Petitioners, although having a clear choice throughout as to the fabric shape which could be used, chose not to make, sell or install a fabric which they knew to be non-infringing; but, in the alternative, intentionally copied (e.g. JA 59) the special Mackie-Duluk fabric and proceeded to specially cut, market and install a fabric of the unique shape taught by Mackie-Duluk. The infringement was intentional, and the result of copying.

ARGUMENT

The Facts Are Clear; Petitioners' Question 1 Is Moot

The facts of record establish, clearly and convincingly, that Petitioners have violated the letter and spirit of 35 U.S.C. § 271, and every section thereof. Notwithstanding the sweeping phraseology of Petitioners' Question 1, 35 U.S.C. § 271(c) goes into much further detail in defining contributory infringement. As developed at pp. 4-5 of this brief, Petitioners violated every element of the statute; and so admitted. The Courts below, in finding contributory infringement, did not do so on the basis of generalities (cf. Question 1 of the Petition) but made specific findings of a highly detailed nature. Since Petitioners do not challenge these findings of fact, it is believed that said findings are controlling.

Question 1 of the Petition has absolutely no relation to the real holdings below; ignores the specific findings, and indeed ignores the language of the statute. The question is, therefore, believed to be moot.

The Circuit Courts of Appeal Are in Complete Agreement With One Another on the Doctrine of Contributory Infringement

The Petition, pp. 10-11, acknowledges that the decision of the First Circuit Court of Appeals below is consistent with decisions of the Fourth and Fifth Circuit Courts of Appeal; but then alleges that these three circuits are in conflict with the Eighth Circuit decision in *Dr. Salsbury's Laboratories* v. *I. D. Russell Co.*, 212 F. 2d 414. This allegation is in complete error.

The Dr. Salsbury's Laboratories case was decided on an issue of fact; and the Eighth Circuit Court of Appeals, in finding no infringement, merely held that defendants' products in that particular case did not meet the statutory definition of contributory infringement, 35 U.S.C. § 271(c). Thus, the Court held, at 212 F. 2d 414, 417:

> "[35 U.S.C. § 271(c)] * * * specifically provides that said component *not* be 'a staple article or commodity of commerce suitable for substantial non-infringing use.' Whatever the significance of the other provisions of the Act, we believe this exceptive clause is controlling here. * * * [Defendant's product] is a staple which did not lose its identity as a common raw material."

Indeed, the *Dr. Salsbury's* case itself disagrees with Petitioners; and specifically states that its ruling is in complete conformity with other decided cases. Thus the Court held:

> "Since, in the respect noted, Section 271(d) *is readily harmonized with prior case authority,*

plaintiff cannot state a new cause of action without, in the very face of the former adjudication, reopening *the factual issue* of the chemical nature of the parties' respective products." (Emphasis added.)

In each of the several cases cited by Petitioners, as in the instant case, the Court went to the statute defining infringement and contributory infringement, examined the specific provisions thereof, and thereafter ruled whether the facts of record established contributory infringement as defined in the statute. Any differences in the final decisions comprise the result of factual distinctions only; and the several Courts of Appeal have never expressed any confusion or conflict regarding the law itself.

Merely by way of example, in *Friedman v. Friedman*, 242 F. 2d 364 (Petition p. 11), the Court, as in the instant case, specifically found that defendant's product was *not* a staple article of the type contemplated by the statutory exclusion. In the *Dr. Salsbury's* case the Court found that defendant's product *was* a staple article, wherefore it was expressly excluded from the statute. The decisions are therefore entirely consistent in respect to their pronouncements of the law and applicable principles; and their sole distinction resides in particular findings of fact.

There Is No Constitutional Question; Petitioners' Question 2 Is Moot

Prior to enactment of 35 U.S.C. § 271(c), literally hundreds of reported decisions, including decisions of this Court, recognized contributory infringement to be a tort, violative of the patent laws. The doctrine of contributory infringement is firmly engrained in the law.

Congress, in enacting 35 U.S.C. § 271(c), hardly exceeded its authority. This Court has long held that the power of Congress to legislate upon the subject of patents is plenary. *McClurg* v. *Kingsland*, 42 U.S. 202, 206. See also *United States* v. *Dubilier Condenser Corp.*, 289 U.S. 178, 189. The clear and concise definition of contributory infringement now spelled out in the statute, and every element of that definition, represents no more than a detailed statement of what has long and consistently been recognized as comprising the violation in question.

The record shows that Petitioners' actions, and the very special nature of their fabric top, are such that Petitioners are clear contributory infringers under the statute; and would be equally clear contributory infringers under any of hundreds of reported decisions preceding enactment of 35 U.S.C. § 271(c). Since Petitioners can find no solace in the facts, they now seek, in a desperate effort to avoid their clear liability, to destroy the statute itself. Even here, however, Petitioners' arguments are not well founded.

Petitioners, in challenging the constitutionality of the statute, quote Mr. Justice Jackson, dissenting in *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 320 U.S. 661, 680 (Petition p. 9). As the quote itself shows, Mr. Justice Jackson was there speaking only of "unpatentable parts." However, the uniquely shaped fabric tops here involved, and found to be infringements, have patentable novelty *per se*, wherefore they most certainly comprise subject matter cognizable by Congress under Article 1, Section 8 of the Constitution.

The patentable novelty of the top fabrics, *per se*, was emphasized by the Court of Appeals below, 270 F. 2d 200, 203:

> "The argument, however, is unsound for the Mackie-Duluk patent does not broadly cover the fabric portion of a folding top of any form or shape. It specifically covers the fabric part of such a top of *a particular form or shape*, * * *. [The District Court] found that the patentees were the first to extend the flaps down far enough so that their bottom lines were at the axis of rotation of the bows and to show that there the fabric could be permanently attached to the bows and the tonneau without ripping when the top was lowered or raised, and that *therein lay the patentable novelty of the patentees' fabric.*" (Emphasis added.)

And the Court of Appeals further found (decision p. 203, footnote 2) that:

> "* * * the element replaced by defendants-appellants was a *patented component* of the Mackie-Duluk combination * * *." (Emphasis added.)

These findings are quite correct, and fully supported by the record, including Petitioners' own admissions; see pp. 3-4 of this brief. The mere fact that this patentably novel fabric was claimed in association with other entirely conventional elements hardly changes the result; for, as is often done in claim drafting, said conventional elements are recited "to describe the invention [i.e. the unique fabric, and its installation] intelligently," *Morrin* v. *Robert White Engineering Co.*, 143 Fed. 519 (CA-2, 1905). See also, *K. W. Ignition Co.* v. *Temco*, 283 Fed. 873, 880 (CA-6, 1922).

The constitutional issue regarding § 271(c) is never reached in this case. We are here dealing with activities which comprise clear and complete violations not only of 35 U.S.C. § 271(c), but of 35 U.S.C. § 271(a) and (b) as well. Petitioners never deny, or seek to

justify, their violations of these latter sections. Moreover, we are dealing with a part which, as the Courts found, itself has patentable novelty. Since Question 2 (Petition p. 3) is based upon the premise that we have a component "itself not being an invention," the Question posed is based on facts contrary to the record and the findings below. The question is, therefore, moot.

There Is No Question of License Involved: Petitioners' Question 3 Ignores the Record

Petitioners' Question 3 assumes a licensed situation. However, both the District Court (JA 39) and the Court of Appeals, 270 F. 2d 200, 205, found that Petitioners' operations did not comprise a permissible repair, but actually comprised a reconstruction of the patented invention. Accordingly it did not matter whether the original structures had been licensed or not. See, for example; *Automotive Parts Co.* v. *Wisconsin Axle Co.*, 81 F. 2d 125, 127; *Davis-Electrical Works* v. *Edison Electric Light Co.*, 60 Fed. 276; and *Thomson-Houston Electric Co.* v. *Ohio Brass Co.*, 80 Fed. 712, 722-3.

The issue of repair or reconstruction is one of fact; see the *Davis Electrical Works* case, supra. Moreover, the findings below that Petitioners "reconstruct" are fully supported by the record. Since Petitioners nowhere challenge these findings of fact, such findings fully dispose of Petitioners' Question 3.

It should further be noted that, in framing Question 3, Petitioners have ignored the record and the actual findings below. No release and or license granted to others prior to suit gave any express rights permitting sale or use of Mackie-Duluk type fabrics, without li-

cense; and the sole issue was therefore whether there was some *implied license* arising from these agreements upon which Petitioners could rely. This question of implied license is one of fact only, *Green v. Electric Vacuum Cleaner Co.*, 132 F. 2d 312, 313-4. The District Court found no license, express or implied, upon which Petitioners could rely, (see JA 33 footnote).

Moreover, Petitioners' Question 3 assumes "a manufacturer licensed under the patent for a combination;" and the Petition, p. 6, further alleges "all Ford Motor cars were licensed after July 21, 1955". The Ford agreement to which Petitioners refer, however, at no time licensed any cars (see JA 510 et seq.); and indeed the Ford agreement was entered into more than a year after the last infringing car had been manufactured and sold by Ford (there being no claim for infringement as to Ford cars later than the 1954 model).

Petitioners' Question 3 accordingly presents no issue warranting review by this Court. The question assumes a licensed situation, whereas the record shows that there was no license, express or implied, on which Petitioners could rely; and further establishes that Petitioners' actual reconstruction of the invention renders all questions of license moot.

There Has Been No Misuse: Petitioners' Question 4 Is Fully Answered Below

The facts surrounding Respondent's acquisition of rights in the Mackie-Duluk patent are clearly developed in the record; and these facts establish that Respondent has at all times acted entirely properly, and with entirely proper motives, in its efforts to resolve this controversy with Petitioners.

Petitioners presented the issue of alleged misuse, and the alleged impropriety of Respondent's territorial grant, to the District Court (Defendants' Answer, paragraphs 17 and 18). After extensive trial, the Court found no misuse (JRA 33, footnote):

> "Finally, they claim mis-use of the patent, a defense I found clearly not made out."

In the Court of Appeals, Petitioners repeated their charges, whereafter the Court held, 270 F. 2d 200, 206:

> "Other arguments advanced by the appellants have been considered but are rejected as too insubstantial to call for discussion."

A petition for rehearing was then filed by Petitioners, repeating these same allegations, specifically discussing the *Mercoid* cases (320 U.S. 661, 680), and alleging "The decision of this court is obviously in direct conflict with these decisions of the Supreme Court." The Court of Appeals, after due consideration, denied the petition for rehearing.

It has, of course, been long settled that a territorial grant is entirely proper. See, for example, 35 U.S.C. § 261, which repeats a long and unbroken line of statutory and case authority to similar effect:

> "* * * The applicant, patentee, or his assigns or legal representatives may in like manner grant and convey an exclusive right under his application for patent, or patents, to the whole *or any specified part of the United States.*" (Emphasis added.)

The record shows that Respondent's acquisition of its territorial grant was based on good consideration; and further shows that there has been no improper relationship whatsoever between Respondent and its predeces-

sor, before, during, or after, acquisition of Respondent's rights (JA 101-2). Petitioners' insinuations of impropriety are thus not well founded in either fact or law.

The allegations of misuse are, significantly, presented in the Petition by way of innuendo and suggestive writing, unsupported by any pertinent record citations. Indeed, in arguing misuse, Petitioners actually misstate the record. As one example, it is noted that the Petition alleges (p. 14) that there are "two combination patents covering the same structures (JRA 32)." Petitioners' record citation hardly supports this conclusion, and the record shows the converse. Petitioners' own original Answer (JA 8) admits, at paragraph 18, that the two patents in question "each * * * could be practiced without infringement of the other", i.e. the two patents relate to entirely different inventions. Acquisition of rights in one of two distinct and separately patented inventions hardly comprises "splitting a cause of action".

Nor is there any truth, much less substance, in Petitioners' allegations (p. 14) regarding "a shell corporation", "real parties in interest", or "manipulation of patent rights". Such slurs, without support in the record, are reprehensible.

The Decision Below Does Not Conflict With Applicable Decisions of This Court

The instant case clearly distinguishes from prior decisions of this Court, cited by Petitioners. Thus, in *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 663, this Court noted:

> "There was ample evidence to sustain the findings of the District Court that respondents endeavored

> to use the license agreement so as to prevent the sale or use of combustion stoker switches in these heating systems unless they were switches made by Minneapolis-Honeywell and purchased from it or its sub-licensees."

And, at decision p. 665 this Court further noted that it was deemed improper for a patentee to use the patent "as the effective means of restraining competition with *its* sale of an unpatented article." Mr. Justice Frankfurter summarized these factors in the *Mercoid* cases, decision p. 676:

> "The Court holds in effect that the owner of a patent who exacts, as the condition of a license, that unpatented materials used in connection with the invention *shall be purchased only from the licensor* cannot obtain relief from equity against one who supplies such unpatented materials * * *. In this view I concur." (Emphasis added.)

In *Automatic Radio Mfg. Co.* v. *Hazeltine Research Inc.*, 339 U.S. 827, 831, this Court noted that, in a different factual situation, the *Mercoid* cases would not be controlling:

> "Petitioner apparently concedes that these cases do not, on their facts, control the instant situation. It is obvious that they do not. There is present here no requirement for the purchase of any goods. Hazeltine does not even manufacture or sell goods * * *."

In the instant case, as in the *Hazeltine* case, Respondent does not manufacture or sell any goods. Respondent has at no time sought to require, as a condition for license, that any unpatented article, or any article whatsoever, be purchased from it; nor has Respondent ever used, or attempted to use, the patent to

secure to itself any competitive advantage in the sale of goods." Respondent has merely sought to license Petitioners under the patent*, and being unsuccessful in this effort, Respondent has sought to enforce its patent rights by the instant litigation. Such actions have never been condemned by any decision of this Court, certainly not by the *Mercoid* cases; and to the contrary, such actions are specifically sanctioned, and recited not to comprise misuse, by 35 U.S.C. § 271(d) [see Petition, Appendix A].

Thus, the Court of Appeals, and the District Court, in no way contravened any applicable decision of this Court when Petitioners' charges of misuse were overruled. Indeed, the decisions below are in full accord with the *Hazeltine* case, supra. Moreover, the decisions below are entirely consistent with decisions in other Circuits. See, for example, *Florence-Mayo Nuway Co.* v. *Hardy*, 168 F. 2d 778, 785 (CA-4, 1948):

> "There is nothing to the contrary in the decision in Mercoid Corporation v. Mid-Continent Investment Co., 320 U.S. 661, 64 S. Ct. 268, 88 L. Ed. 376. That case merely applies the salutary rule that a combination patent may not be used to protect an unpatented part *from competition*. Nothing of that sort is involved here. What the defendants are doing is manufacturing and selling machinery with the knowledge, purpose and intent that it shall be used in a combination which will infringe. The case is one where plaintiff is using his patent *not to monopolize the sale of what is not patented but to prevent defendants from aid-*

* Petitioners originally desired such a license from Respondent's predecessor (JA 474), since Petitioners' own counsel admittedly thought that Petitioners might be infringing (JA 224). Petitioners later refused license on the ground that an alleged redesign of the structure avoided infringement (JA 475).

> *ing others to infringe what is patented.* A clearer case of contributory infringement could not well be imagined than that presented by this record. (Emphasis added.)

See also *Metallizing Engineering Co. v. Metallizing Co. of America*, 62 F. Supp. 274, 276-7.

The *Micromatic Hone* and *Landis Machine Co.* cases, cited at Petition p. 13, each involved a situation in which the patentee sought to acquire, in himself a competitive advantage in the sale and or installation of unpatentable parts. The holdings in these cases are therefore entirely consistent with this Court's decision in the *Mercoid* cases, where such action was condemned. By the same token, however, these cases in no way conflict with the Court of Appeals decision in the instant case.

The decisions below, moreover, do not conflict with *Morgan Envelope Co. v. Albany Paper Co.*, 152 U.S. 425 (Petition pp. 12-13). This Court expressly recognized the doctrine of contributory infringement in that case, and stated that in a proper factual situation

> "sale of a single element of a combination, with intent that it shall be united to the other elements, and so complete the combination, is an infringement."

This Court found no infringement under the particular facts of *Morgan Envelope*, since the product was "unpatentable", was "perishable", was not used in "a practical reconstruction of the device", and since the patentee "intended" that one purchasing the original article would have the right to replace.

In the instant case, however, the facts are the direct converse. The Court below expressly considered the

Morgan Envelope case and analogous decisions of this Court (see 270 F. 2d 200, 203-4); but found that the specially shaped fabric *did* have patentable novelty; was *not* perishable within the meaning of prior decisions, *was* used in a "major reconstruction of the top assembly", and that car owners would not "rationally believe" the contrary (see 270 F. 2d 200, 205). The entire distinction was, therefore, factual; and Petitioners, again, do not challenge these findings of fact.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition should be DENIED.

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